IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7023 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANAIYALAL NANDUMAL & 1 - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR DD VYAS for Petitioner(s) : 1 - 2.
MR AY KOGJE, AGP for Respondent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 21/11/2006

ORAL JUDGMENT

1. Shri D.D. Vyas, learned counsel for the petitioners. Shri A.Y. Kogje, learned AGP for the respondents. The parties are finally heard.

2. Somewhere in the year 1980, the petitioners could secure permission under the hands of the Collector under Section 65 of the Bombay Land Revenue Code, 1879 for raising residential construction on the plot in their possession. Even at this stage, it is to be noted that the petitioners had made joint application and had secured joint order in their favour. The plot in dispute was admeasuring 562 meters but the Collector granted permission to raise one single construction to the tune of 160.60 sq.mts. The petitioners thereafter made separate applications to the Municipality for sanction of the plans, two separate permissions were sought and instead of one joint construction, two separate residential constructions were made. The total area, according to the respondents exceeded by 21.90 meters. After learning about the fact, the Collector issued a notice dated 14.8.99 to each of the petitioner asking them to show cause as to why construction was made beyond the permission granted, the construction was illegal as the marginal land, which was

required to be kept open was not left and if permission was for one single construction, why two separate constructions at a distance of 3/5 meters have been raised.

3. Each of the petitioner appeared before the Collector and submitted that they did not raise any extra construction and if ultimately any construction in excess of the said permission is found, the same be regularised, they admitted that the land to be left as marginal open land was not available in accordance with the permission granted by the Collector but submitted that the land was left as marginal open land in accordance with the municipal byelaws and the plans sanctioned by the Municipality. It was lastly submitted that each of the petitioner made separate application to the Municipality for sanction of the plans and as the separate applications were sanctioned, construction of two separate units was not illegal. After hearing the parties, the Collector, by his order dated 29.10.90 made in Vashi.23-B 2384/exemption final regisration

no.22/89 No. CH/N.A./Breach of condition/Reg.3/90-91, directed that the illegal construction beyond the permission of the Collector be removed. The petitioners being aggrieved by the said order, took up the matter before the Additional Secretary, Revenue Department [Disputes], the matter was registered as SRD/BKHP/VLS/790.5/95 and as the said matter came to be dismissed on 21.6.95, the petitioners are before this Court.

4. Shri D.D.Vyas, learned counsel for the petitioners submits that the construction was not contrary to the municipal byelaws and the municipal sanction therefore the Collector could not direct demolition. So far as this argument is concerned, it would run contrary to the permission granted by the Collector and the provisions of Section 65/65A read with Section 66 of the Bombay Land Revenue Code, 1879. Section 65 and Section 65A provide that with the permission of the Collector, a particular type of the land can be used for raising construction etc. The Collector, after being satisfied, may

grant such permission. The permission is an authority conferred upon the said applicant to raise construction. If anybody violates that condition or raises any construction without sanction or permission, then, an action under Section 66 may be taken against such person.

5. Present is not a case where the Municipality was taking some action against the petitioners, present is a case where the permission/sanction granted by the Collector has been violated. Section 66 of the Code reads as under:-

> “66. Penalty for using land without permission._ If any land referred to in section 65 or section 65-A be used for any purpose other than the purpose for which such land is assessed or held without the permission of the Collector being first obtained, or before the expiry of three months referred to in section 65 or despite refusal of permission during the said period of three months, then, without prejudice to the occupant's liability to pay the new

assessment leviable under section 48 or the conversion tax leviable under section 67-A,__

[a] the occupant and any tenant or other person holding under or through him shall be liable to be summarily evicted by the Collector from the land so used and from the entire survey number or sub-division of the survey number of which it may form a part; and

[b] the occupant shall also be liable to pay for the period during which the said land has been so used, such fine as the Collector may, subject to the general orders of the State Government, direct.

Any tenant of any occupant or any other person holding under or through an occupant, who shall without the occupant's consent use any such land for any such purpose, and thereby render the said occupant liable to the penalty aforesaid, shall be responsible to the said occupant in damages."

6. A fair understanding of Section 66 would make it clear that any land which is used without the permission of the Collector being first obtained or before the expiry of three months referred to in Section 65, then, without prejudice to the occupant's liability to pay, the new assessment leviable under Section 48 or the conversion tax leviable under Section 67-A, the occupant may be summarily evicted from the land so used and from the entire survey number and occupant would also be liable to pay such fine as the Collector may direct. In the present matter, any construction beyond 160.60 sq.mts. would be in contravention of the permission and would also be in contravention of the provisions contained in Section 65 or Section 65A. In such case, the Municipality even cannot regularize the construction nor can sanction the plan. The authority to raise the construction is not conferred by the Municipality, but the authority to raise construction is conferred by the Collector under his orders and armed with such order, an application could be got approved and

sanctioned. Any construction, which is not in contravention of the municipal byelaws or sanctioned plan *ipso facto* would not become legal construction for purposes of Section 66. For the purpose of Section 66, there must be a previous sanction or an action within three months in accordance with Section 65. If permission is not sought or the construction is not got regularised within three months in accordance with Section 65, then, the person, who has raised illegal construction would not be permitted to say that as his construction is in accordance with municipal byelaws, no action be taken against him.

7. It was then contended that the Collector be asked to regularize everything. When I asked Mr. Vyas that is there any such provision under the Bombay Land Revenue Code, 1879, he fairly submitted that barring Section 66, there is no other provision. If there is no provision authorizing the Collector to regularize the excess construction or construction which is contrary to Section 65/65A, then, a direction

also cannot be issued to the Collector to regularize the construction.

8. It was then submitted that as there were two separate applications by each of the petitioner to the Municipality and as two separate plans were permitted, there was no illegality in the construction. In the opinion of this Court, the argument is an argument of frustration. The Collector did not permit construction of two separate units, he permitted construction of 160.60 sq.mts as one unit only. Assuming that each of them could make separate application, but then, each of them was required to inform the Municipality that there was permission for one single construction to the extent of 160.60 sq.mts. By suppressing the material fact, if they got two plans approved, then, at this stage, they cannot be allowed to take advantage of their own wrong. Separate constructions were certainly contrary to the permission granted by the Collector.

9. It was then submitted that the Collector be asked to impose some fine and grant permission

afresh or compound the action. In the opinion of this Court, Section 66[a] and [b] are to be read together and not separately. Summary eviction and imposition of fine are not alternatives, the Collector cannot substitute fine in place of eviction. Under the Scheme of the Code, fine has to be in addition to the eviction.

10. The order of the Collector, which has been confirmed by the Secretary has not been challenged by the other side. The Collector had been generous enough in favour of the petitioners by directing that illegal construction only be removed though he was entitled to direct the eviction of the petitioners and confiscation of the property with further liability of fine against the petitioners. Be that as it may. As the said order stands, I would simply say that the petitioners, if are well advised, should immediately remove the construction which is in excess of 160.60 sq.mts. If the said construction is not removed and the authorities do not certify removal of construction, then,

the Collector would be entitled to take distress warrant and further steps in accordance with law.

11. The petition is dismissed. Rule is discharged. There shall be no costs. Interim relief, if any, stands vacated.

[R.S. GARG, J.]

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